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FOR ARGUMENT

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

APPELLEE'S BRIEF

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SUBJECT INDEX

	Page
The opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statutes involved	2
Statement of the case	3
Summary of argument	7
Argument	11
I	
This case is properly resolved on the present state of the record since the appellants have not sought approval from the city and thus their attack is limited to the effect of the zoning ordinances as enacted	11
II	
The city's zoning ordinances are valid under constitutional standards of substantive due process. Furthermore, they satisfy the several tests which have been formulated for determining that a regulation is not a "taking"	16
A. The constitutional standard for determining the validity of a legislative act (which does not infringe on any fundamental right) is whether there is a reasonable basis for the act and it has a substantial relationship to the protection of the public health, safety or welfare. The zoning ordinances in issue plainly satisfy that test	16
B. Recent decisions of this court have set forth the tests which delineate between exercises of governmental regulatory authority which are not "takings" and those which would be "takings" unless invalidated	18
C. Appellants' attack on California case law is unwarranted	26
III	
There has been no abuse of the eminent domain power by the city and there is no continuing intent to acquire appellants' property. Therefore, a "taking" can not be found based on an improper course of conduct	29

SUBJECT INDEX

IV	Page
Where regulatory actions would constitute "takings" if enforced, the courts have consistently invalidated the offending measures	32
A. American courts have utilized the remedy of invalidation for land use regulations which would otherwise be "takings"	32
B. The courts have ordered damages where such damages have been contemplated or intended by the legislature. Otherwise the courts have invalidated confiscatory regulations	37
C. Physical invasion concepts are not applicable	43
V	
Supposed exclusionary effects and impacts on the cost of housing are not issues in this case	44
Conclusion	46

TABLE OF AUTHORITIES CITED

Cases	Page
Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280	13, 14
Agins v. City of Tiburon (App. 1978) 145 Cal. Rptr. 476	6
Air Quality Products v. State of California (1979) 96 Cal. App. 3d 340	14
Aircraft & Diesel Corp. v. Hirsch (1947) 331 U.S. 752	14
Allen v. Grand Cent. Aircraft Co. (1954) 347 U.S. 535	14
Allen v. Humboldt County Bd. of Supervisors (1966) 241 Cal. App. 2d 158	28
Alma Motor Co. v. Timken-Detroit Axle Co. (1946) 329 U.S. 129	36
Andrus v. Allard (1979) .... U.S. ...., 100 S. Ct. 318	9, 10, 18, 19, 33
Armstrong v. United States (1960) 364 U.S. 40	22
Avco Community Developers, Inc. v. South Coastal Regional Commission (1976) 17 Cal. 3d 785, cert. den. 429 U.S. 1083	20, 26
Bank of America v. State Water Resources Control Bd. (1974) 42 Cal. App. 3d 198	28
Benenson v. United States (Ct. Cl. 1977) 548 F.2d 939	30, 31, 39
Bibb v. Navajo Freight Lines (1959) 359 U.S. 520	16, 17
Briggs v. State of California (1979) 98 Cal. App. 3d 190	27
California Comm'n v. United States (1958) 355 U.S. 534	14
Cardon Oil Co. v. Phoenix (Ariz. 1979) 593 P. 2d 656	35
Charles v. Diamond (1977) 392 N.Y.S. 2d 594	40
Chavez v. Times-Mirror Co. (1921) 185 Cal. 20	12
Construction Industry Ass'n v. City of Petaluma (9th Cir. 1975) 522 F. 2d 897	46
Cuyahoga River Power Co. v. Akron (1916) 240 U.S. 462	15
Davis v. Pima County (Ariz. 1978) 590 P. 2d 459, cert. den. (1979) .... U.S. ...., 39 CCH S.Ct. Bull. 3178	34, 35
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Donohoe Const. Co. v. Montgomery Cty. Council (4th Cir. 1977) 567 F. 2d 603	10, 30, 31

Table of Authorities Cited

Cases	Page
Drake's Bay Land Co. v. United States (Ct. Cl. 1970) 424 F. 2d 574	30, 31, 38
Dugan v. Rank (1963) 372 U.S. 609	44
Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668	13
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Euclid v. Ambler Realty Co. (1926) 272 U.S. 365	7, 11, 12, 16, 25
Eyherabide v. United States (Ct. Cl. 1965) 345 F. 2d 565	22
Fred F. French Investing Co. v. City of New York (1976) 385 N.Y.S. 2d 5	33, 34
Fresno v. California (1963) 372 U.S. 627	44
Friedman v. City of Fairfax (1978) 81 Cal. App. 3d 667	27
Frisco Land & Mining Co. v. State of California (1977) 74 Cal. App. 3d 736	27
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Hortonville J. S. D. No. 1 v. Hortonville Ed. (1976) 426 U.S. 482	13
Hoshour v. County of Contra Costa (1962) 203 Cal. App. 2d 602	28
Hurley v. Kincaid (1932) 285 U.S. 95	43, 44
Jacobson v. County of Los Angeles (1977) 69 Cal. App. 3d 374	28

Table of Authorities Cited

Cases	Page
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Jensen v. City of New York (1977) 42 N.Y. 2d 1079	34
Just v. Marinette County (Wisc. 1972) 201 N.W. 2d 761	20
Kaiser Aetna v. United States (1979) .... U.S. ...., 100 S.Ct. 383	9, 19, 25, 32, 35
Kasser v. Dade County (Fla. 1977) 344 So. 2d 928	41
Klopping v. City of Whittier (1972) 8 Cal. 3d 39	32
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency (1979) .... U.S. ...., 99 S. Ct. 1171	36
Mailman Development Corp. v. City of Hollywood (Fla. 1974) 286 So. 2d 614	35
Martinez v. California (1980) .... U.S. ...., 40 CCH S.Ct. Bull. B427	39
McMillan v. American Gen. Fin. Corp. (1976) 60 Cal. App. 3d 175	28
Miller v. Schoene (1928) 276 U.S. 272	21
Moore v. East Cleveland (1976) 431 U.S. 494	14
Morton v. Superior Court (1970) 9 Cal. App. 3d 977	14
Mosher v. Phoenix (1932) 287 U.S. 29	15
Mugler v. Kansas (1887) 123 U.S. 623	8, 16, 21
National League of Cities v. Usery (1975) 426 U.S. 833	41
Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com. (1976) 57 Cal. App. 3d 76	28
Pardee Construction Co. v. California Coastal Com. (1979) 95 Cal. App. 3d 471	28
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Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393	35, 36
Portsmouth Harbor L. & H. Co. v. United States (1922) 260 U.S. 327	15, 16
Rank v. Krug (1950) 90 F. Supp. 773	12

Table of Authorities Cited

Cases	Page
Regional Rail Reorganization Act Cases (1974) 419 U.S. 102	10, 37, 44
Reinman v. Little Rock (1915) 237 U.S. 171	21
Rescue Army v. Municipal Court (1947) 331 U.S. 549	14, 15, 36
Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency (9th Cir. 1977) 561 F. 2d 1327	31
Sala v. County of Suffolk (2d Cir. 1979) 604 F. 2d 207, U.S. app. pndg.	40
Salzburg v. Maryland (1954) 346 U.S. 545	17
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Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110	27, 39
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Specter Motor Co. v. McLaughlin (1944) 323 U.S. 101	36
State v. Johnson (Me. 1970) 265 A. 2d 711	35
State v. Superior Court (1974) 12 Cal. 3d 237	39
Toso v. City of Santa Barbara (1980) 101 Cal. App. 3d 934	27, 32
Trustees Under Will, etc. v. Town of Westlake (La. 1978) 357 So. 2d 1299	35
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Table of Authorities Cited

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Village of Belle Terre v. Boraas (1974) 416 U.S. 1	16
Warth v. Seldin (1975) 422 U.S. 490	14, 45
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Constitutions

United States Constitution, Amendment V	2, 32
United States Constitution, Amendment XIV	2, 32

Statutes

28 U.S.C. § 1257(2)	1
42 U.S.C. § 1983 (Civil Rights Act)	36
California Code Civil Procedure:	
§ 1255a(a) (repealed by Cal. Stats. 1975, ch. 1275, §1)	6
§ 1255a(c) (repealed by Cal. Stats. 1975, ch. 1275, § 1)	7
California Government Code:	
§ 818.2	10, 39
§ 818.4	10, 39
§ 821.2	10, 39
§ 6950 et seq.	24
§§ 6950 through 6954	23
§ 65302	3, 8
§ 65302(a)	4
§ 65302(c)	45
§ 65302(e)	17, 23
§§ 65560 et seq.	3, 8, 23
§§ 65560 through 65568	17
§ 65561(b)	18
§ 65567	18, 23
§ 65910	4, 18, 23
§§ 65910 through 65912	17
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TABLE OF AUTHORITIES CITED

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1 Nichols on Eminent Domain (3d rev. ed. 1979) § 1.42(7)	18
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THE OPINION BELOW

The opinion of the Supreme Court of California is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25. It is set out in full in appendix A of the jurisdictional statement.

JURISDICTION

The jurisdictional facts are correctly stated by appellants in their statement of jurisdiction. Jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Is this case properly resolved on the present record where the facts as pleaded in the complaint, and the contents of the City's two relevant zoning ordinances, present the controversy and nothing further would be developed at trial since the issues raised are limited to the effect

of the ordinances as enacted because appellants have never applied to the City for any development approval whatsoever?

2. Has there been a "taking" where the City's zoning ordinances, as interpreted by the state court, allow residential development, which appellants allege was their primary purpose in acquiring the property, and where the ordinances do not interfere with any distinct investment-backed expectations, do not single out appellants for unfair treatment, and no action of the City has constituted a physical invasion of the property?

3. Has a "taking" occurred where the City's planning process considered options of regulation and acquisition of open space, and where the City's eminent domain action to acquire appellants' property was filed without undue delay and was abandoned according to the procedures specified by state law, and thereafter appellants' property was subject to the same zoning restrictions as numerous other properties within the City?

4. If an exercise of the police power should come into conflict with property rights protected by the Fifth and Fourteenth Amendments to the United States Constitution, would a judicial decree of invalidation constitute an appropriate remedy, or does the Constitution compel forced purchase?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth and Fourteenth Amendments to the United States Constitution (recited in appellants' brief at 2) and the City's open space zoning ordinances, which are Ordinance No. 123 N.S. (appendix D to the jurisdictional statement) and Ordinance No. 124 N.S. (appendix E to the jurisdictional statement).

STATEMENT OF THE CASE

The present appeal has been taken from the ruling of the California Supreme Court affirming the dismissal of appellants' complaint in inverse condemnation and for declaratory relief. (JSA, pp. 26-27).[1] Therefore, the facts before this Court are the appropriately pleaded facts of the complaint (not including its many conclusions of law) as well as two zoning ordinances adopted by the City of which judicial notice was taken by the California Supreme Court.[2]

According to the complaint, appellants own five acres of land in the City of Tiburon (Marin County) which they acquired for the purpose of residential development. Tiburon has an area of 1,676 acres, a population of approximately 6,000 (based upon the 1970 census) and because of its proximity to the City of San Francisco, its favorable climate, the sweeping views of the San Francisco Bay Area and other amenities, is a very desirable suburban residential area. (JA, pp. 3-4; JSA, p. 2).[3]

Tiburon, as well as every other city and county in California, is required to prepare a comprehensive general plan containing, *inter alia,* a land use element and open space element. (JS, p. 2; *see also* Cal. Gov't Code §§ 65302 and 65560 et seq.).[4] State law also requires that cities like

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[1]This is a reference to an appendix in the jurisdictional statement. Other references to the appendices of the jurisdictional statement will be made in the same manner. References to the joint appendix will be designated as JA, with appropriate page references.

[2]The complaint may be found in JA, pp. 3-13. The two City zoning ordinances are located at JSA, pp. 28-46.

[3]Some of the references are to the statement of facts found in the opinion of the California Supreme Court. Appellants' petition for rehearing before the state supreme court did not object to the court's factual statement, except to take issue with the court's reliance on the terms of the City's zoning ordinances. *See* appellants' petition for rehearing at p. 43.

[4]These mandatory state requirements regarding the contents of plan elements are quite detailed. For example, the land use ele-

Tiburon have open space zoning ordinances which are consistent with the adopted open space plan. Cal. Gov't Code § 65910.

The development of the required general plan in California entails a careful examination of numerous interrelated factors. Smaller cities would, under these circumstances, usually seek the advice of expert consultants whose recommendations would be considered when the city prepares its general plan. The City of Tiburon followed this approach by retaining two private consulting firms to prepare advisory reports. (JSA, p. 2).

In January of 1972 the City directed the firm of Williams and Mocine to prepare and deliver an open space plan. The report of that firm, issued in October of 1972, focused on possible land use designations and recommended that the City attempt to acquire a substantial portion of "Tiburon Ridge" for "open space". Appellants' property was identified in the report as one of the parcels involved. Also in January of 1972, the City retained Dean Witter & Company to prepare a written plan for open space acquisition financing. The Witter report, issued in July of 1972, recommended that the purchase of open space lands be financed by $1.25 million worth of general obligation bonds. (JA, pp. 5-6; JSA, pp. 2-3).

On January 28, 1973, the City adopted two ordinances which effected widespread zoning modifications in the City. These modifications drew upon but did not mirror the consultants' reports. (JSA, p. 3). Ordinance No. 123 N.S.

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ment must indicate the general distribution and location of land uses within the community and must also include a statement of the standards of population density and building intensity recommended for various districts. Cal. Gov't Code § 65302(a). The implications of the extensive requirements for an open space element as required by state law are discussed in this brief.

created and defined a "Residential Planned Development and Open Space Zone" ("RPD-1"). A key purpose of this zone was to permit reasonable use of open space land while also attempting to protect open space characteristics found within the zone. (JSA, p. 30). In this regard, the authorized uses of land under this zone were designated as 1) one-family dwellings, 2) open space uses, and 3) accessory buildings and accessory uses. The permissible density of buildings is designated to be not less than .2 nor more than one dwelling unit per gross acre. The ordinance contemplates the submission of a master plan which would be measured against the standards set forth in the ordinance. (JSA, pp. 28-36).

Ordinance No. 124 N.S. designated the particular parcels, including appellants' five acres, which would fall under the requirements of 123 N.S. (JS, pp. 3, 41-46). Appellants' property was designated in the "RPD-1" zone. (JSA, p. 3). Significant amounts of land other than appellants' property were also designated under this zone.[5] Appellants allege that Ordinance No. 124 N.S. forever prevented the development of the property for residential use or other use and completely destroyed the value of their property for any purpose or use whatsoever. (JS, pp. 5-7). However, the California Supreme Court concluded that as applied to appellants' five acres, " 'RPD-1' zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build

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[5]While the text of the zoning ordinances are in the joint appendix, the map designated as exhibit A to Ordinance No. 124 N.S. is in the clerk's transcript and consists of two pages designated 21m (found following the text of the zoning ordinance). The two pages are actually one map and to be seen together should be placed side by side. The map illustrates the zoning districts created by the ordinance.

five dwelling units or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report." (JSA, p. 3).

In connection with the planning studies and Ordinance No. 124 N.S. appellants allege that the ordinance incorporated and adopted both plans in every respect. However, this allegation is completely contradicted by the terms of both of the City's zoning ordinances since neither makes any mention of the studies or of efforts to acquire the property. The Court of Appeal, which decided this case prior to its being heard by the California Supreme Court, stated: "Contrary to the allegations of the complaint, the ordinance does not incorporate by reference either of the 1972 reports on which it was based." *Agins v. City of Tiburon* (1978) 145 Cal. Rptr. 476, 478 n.2.

Appellants have never made application to use or improve their property following the City's adoption of Ordinance No. 124 N.S. nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. (JSA, p. 3).

On October 15, 1973, appellants filed a claim against the City in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The City rejected the claim on November 12, 1973. (JS, pp. 7-8; JSA, pp. 3-4).

On October 26, 1973, the City passed a resolution directing acquisition by condemnation of appellants' property. (JS, p. 8). On December 4, 1973, the City filed a complaint in eminent domain to acquire appellants' property, but on November 1, 1974, the City filed a notice of abandonment of the proceedings as then authorized by Cal. Code Civ. Proc. § 1255a(a).[6] The trial court entered

[6]This section was repealed by Cal. Stats. 1975, ch. 1275, § 1.

a judgment of dismissal of the action on May 20, 1975, and in this connection the City paid appellants $4,500.00 for their necessary expenses incurred during the pendency of the action pursuant to Cal. Code Civ. Proc. § 1255a(c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. (JS, pp. 8-10; JSA, p. 4).

On June 16, 1975, appellants filed the instant action consisting of two causes of action, a claim in inverse condemnation and a request for declaratory relief. The claim in inverse condemnation sought $2,000,000.00 on the theory that the land was taken for a public use without the payment of just compensation. The cause of action in declaratory relief sought to have Ordinance No. 124 N.S. declared unconstitutional as applied to appellants' property. The City's general demurrer to the first cause of action was sustained without leave to amend while its demurrer to the second cause of action was sustained with ten days leave to amend (which appellants declined to do). (JSA, p. 25). The California Supreme Court affirmed the judgment of dismissal entered by the trial court and the present appeal has been taken from the ruling of the California high court.

SUMMARY OF ARGUMENT

1. Appellants have never applied to the City for permission to develop their property in any manner whatsoever. Yet, they allege that the effect of the City's zoning ordinances has been to destroy the value of their property. As long ago as *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, this Court allowed judicial review of the validity of an ordinance as enacted, but refused to review how such a zoning ordinance might be applied in a particular circumstance when local procedures had yet to be

invoked. In the instant case, the California Supreme Court took judicial notice of the zoning ordinances and construed them to require that as a matter of right appellants can develop a minimum of one residential unit and possibly five residential units on the five acres involved. This construction of the local ordinance is binding upon this Court. *Shuttlesworth v. City of Birmingham* (1965) 382 U.S. 87, 91.

In this context, the case can be resolved on the present record. To allow speculation at trial as to how the ordinance might be applied to the particular property, considering all of the variables involved, would cause the court to anticipate constitutional problems which might well be vitiated by the City's approval process and would cause the courts to become planning bodies since the trial would involve, of necessity, most of the same considerations that would be undertaken in the City's review process.

In short, the demurrer interposed by the City admits the allegations of the complaint for the purpose of determining whether the complaint states a claim. Together with the provisions of the zoning ordinances, the facts are spread before the Court and only legal issues are raised.

2. It is apparent that the City's zoning ordinances attempt to strike a balance between protection of certain environmental resources and the property owner's right to a reasonable use. In so doing, the City is carrying out the mandates of a state program. *See* Cal. Gov't Code §§ 65302 and 65560 et seq. Undoubtedly, a reasonable basis and legitimate governmental purpose support these ordinances. This was implicitly recognized by the California Supreme Court. There can be no question regarding the validity of these ordinances. *See, e.g., Mugler v. Kansas* (1887) 123 U.S. 623, 661.

Furthermore, the ordinances do not constitute "takings". Governmental authority to regulate is subject only to the dictates of "justice and fairness." *Andrus v. Allard* (1979) ..... U.S. ....., 100 S. Ct. 318, 327. Specifically, the ordinances satisfy the various tests which have been developed for resolving this issue. The ordinances allow residential use, the primary expectation of appellants in purchasing the property. They do not interfere with any investment-backed expectations as the mere purchase and ownership of vacant land does not insulate the owner from future regulation in perpetuity. *Compare Andrus v. Allard, supra, with Kaiser Aetna v. United States* (1979) ..... U.S. ....., 100 S. Ct. 383. The ordinances do not single out appellants' property as they apply to numerous other properties within the City; reciprocity of benefits and burdens is distributed among properties affected by the ordinances; no physical invasion or servitude has been created, especially by the mere enactment of the ordinances which in and of themselves impose no direct restrictions on the property. *See generally Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104. In this latter regard, the ordinances do not sanction or allow public use of the property and the "right to exclude others" has not been affected. *See Kaiser Aetna v. United States, supra,* at 393.

3. Nor has there been any abuse of the planning or eminent domain power by the City. In a timely manner the City received planning reports, adopted zoning ordinances, filed an eminent domain action to acquire appellants' property, and thereafter abandoned the action according to state law. From that point on no further effort is alleged to have been made by the City to reinstitute eminent domain proceedings. The sole operative factor controlling appellants' use of their property are the zoning ordinances.

The federal courts have implied "takings" only where it is clear that governmental authority has egregiously abused its condemnation powers. *Donohoe Const. Co. v. Montgomery Cty. Council* (4th Cir. 1977) 567 F.2d 603, 609. Such is not the case here. This is especially true where condemnation efforts have been terminated. In fact, it is difficult to know how the City could have proceeded to develop an open space program, other than as it did. Appellants' efforts to characterize the activities which were undertaken as abusive do not withstand scrutiny. If the City were not able to proceed in the open manner that appellee did, the kind of conspiratorial, backroom decision making which could lead to abuses would be encouraged.

4. When courts have been faced with regulations which if enforced would constitute "takings", they have invalidated those measures because they are unaccompanied by the just compensation which would be necessary to sustain them. *Penn Central Transp. Co. v. New York City, supra,* at 136. This approach reflects the proper accommodation between one of the least limitable powers of government (the "police power") and the rights accorded to private property. A remedy of forced purchase through the payment of just compensation would amount to government by purchase. *Andrus v. Allard, supra,* at 326.

The courts have invoked the remedy of compensation for "takings" where it is apparent that the legislative body contemplated that remedy. *See, e.g., Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102. In the instant case, it is apparent from the immunities from liability enacted by the California Legislature that there was no legislative contemplation of damages. Cal. Gov't Code §§ 818.2, 818.4 and 821.2; *HFH, Ltd. v. Superior Court* (1975) 15 Cal. 3d 508, 519-20, *cert. den.* 425 U.S. 904.

Courts have also found compensable "takings" upon physical invasions of private property by governmental action. This result has obtained because of the perceived unfairness of singling out particular property and forcing it to bear a burden which should be spread across all of society. This approach also accords with the historic purpose of the fifth amendment, which was to protect property from expropriation. Entirely different considerations are at work when the effect of governmental regulation must be weighed against the Takings Clause. Physical invasion concepts have no applicability in the regulatory context. In this case, there was no physical invasion of appellants' property either by regulation or abusive use of the power of eminent domain.

ARGUMENT

I

THIS CASE IS PROPERLY RESOLVED ON THE PRESENT STATE OF THE RECORD SINCE THE APPELLANTS HAVE NOT SOUGHT APPROVAL FROM THE CITY AND THUS THEIR ATTACK IS LIMITED TO THE EFFECT OF THE ZONING ORDINANCES AS ENACTED.[7]

Appellants' complaint, distilled to its essence, alleges that the City's zoning ordinances which govern the use of appellants' property had the effect of precluding all use and destroying all value of that property. As long ago as 1926 this Court held that where it is alleged that a zoning ordinance of its own force constitutes a present invasion of the owner's property rights, an action may be maintained to challenge its validity. *Euclid v. Ambler Realty Co., supra,* at 386. In so holding, however, this Court de-

[7]The substantive validity of the ordinances, the conclusion that they do not constitute "takings", and the failure of the complaint to state a claim for abusive use of the eminent domain power will be established, *infra,* at II & III.

clined to speculate as to how the ordinance might be applied, relying in part on the Court's traditional policy of avoiding issues which are not ripe for resolution. The propriety of this policy was particularly noted with respect to the "powers of police" which were involved there and are involved here. *Euclid, supra,* at 395-97. Pursuant to this approach, followed by the California Supreme Court, the effect of the City's zoning ordinances as enacted is properly before the Court. How the ordinances might be applied, upon a proper application by appellants to the City, is not.

To deal with the issue raised by appellants' allegations that the zoning ordinances render their property useless, the California Supreme Court took judicial notice of the ordinances. That this is proper under California law is indicated from the opinion of the California Supreme Court itself. It is also proper under California law for a court to refuse to deem admitted a fact alleged in a complaint which is contradicted by facts subject to judicial notice. Again, this is evident from the opinion of the California Supreme Court in the instant case.[8] Also, in *Chavez v. Times Mirror Co.* (1921) 185 Cal. 20, it was stated: "There is apparently no dissent from the proposition that in the consideration of a pleading courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary." *Id.* at 23.

After having taken judicial notice of the ordinances, the California Supreme Court unequivocally construed them to allow appellants to build "between one and five

[8]The federal courts have taken judicial notice of facts on motions to dismiss. *Rank v. Krug* (1950) 90 F. Supp. 773. Federal courts have also refused to accept as admitted facts which are contradicted by facts subject to judicial notice. *Saxton v. McDonnell Douglas Aircraft Co.* (1977) 428 F. Supp. 1047, 1049 n.5.

residences on their property." (JSA, p. 13).[9] This construction, of course, is binding upon this Court. *Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668, 674; *Hortonville J. S. D. No. 1 v. Hortonville Ed.* (1976) 426 U.S. 482, 488; *Groppi v. Wisconsin* (1971) 400 U.S. 505, 507; *Shuttlesworth v. City of Birmingham, supra,* at 91 (state court construction of local ordinance); *Green v. Neal* (1832) 31 U.S. 188, 192-94.[10]

In sum, what is presented is the constitutional propriety of speculating as to how the allegedly offending City zoning ordinances might be applied to appellants' property. Since many possible results could flow depending on the contents of a master plan proposal submitted by the property owners, the physical circumstances of the property and other relevant criteria from the ordinance, it is simply impossible, and certainly inappropriate, to anticipate issues beyond the facial interrelationship of the zoning ordinances and the appellants' allegations.

This has been the policy of this Court, which has consistently recognized the utility of requiring available administrative processes to be invoked prior to judicial review.[11] This policy tends to support the broader policy

[9]It must be observed that the interpretation placed upon the ordinances by the state court avoids, rather than raises, constitutional questions by requiring that use be allowed.

[10]The irrelevance of the argument of amicus curiae Half Moon Bay Properties, Inc. that the California Supreme Court incorrectly construed this ordinance is thus evident. *Id.* at 7-10. Moreover, as the state's high court recognized, Ordinance No. 123 N.S. indicates that allowable density shall be not less than .2 dwelling units per gross acre. Thus, on a five-acre parcel at least one dwelling unit would be allowed as of right.

[11]While the opinion of the California Supreme Court makes no mention of the doctrine of exhaustion of administrative remedies, it was obviously implicit in the Court's refusal to anticipate how the ordinance might be applied. Under California law failure to exhaust available administrative remedies leaves a court without jurisdiction. *Abelleira v. District Court of Appeal* (1941)

of reaching constitutional issues only by necessity. For example, in *Aircraft Diesel Corp. v. Hirsch* (1947) 331 U.S. 752, the Court stated: "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for a judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings." *Id.* at 767. In *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, this Court avoided a "taking" claim as premature until exhaustion of required administrative procedures. *Id.* at 553. Of course it is entirely possible that the City's action in applying the zoning ordinance "might leave no remnant of the constitutional question." *See California Comm'n v. United States* (1958) 355 U.S. 534, 539-40. Likewise in *Moore v. East Cleveland* (1976) 431 U.S. 494 the Chief Justice stated:

> It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by the City should foreclose her from pressing in this Court any constitutional objections to the City's zoning ordinance.

Id. at 521. In analogous circumstances this Court has refused to anticipate constitutional issues since it refused to assume that one denial was certain to mean that all use would be prohibited. *Penn Central Transp. Co. v. New York City, supra,* at 136-37.[12] *See Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 568-75 (general discussion re-

17 Cal. 2d 280; *Morton v. Superior Court* (1970) 9 Cal. App. 3d 977, 981; *see also Air Quality Products v. State of California* (1979) 96 Cal. App. 3d 340, 352. The City's demurrer raised this defense. (JA, p. 25).

[12]Standing has been denied to parties seeking to attack a zoning ordinance as discriminatory based in part upon failure to utilize available administrative remedies. *Warth v. Seldin* (1975) 422 U.S. 490, 504.

garding the policy of strict necessity in disposing of constitutional issues).

Appellants' plea for a trial in this case flies in the face of the established constitutional doctrines just recited. If by the allegation that a particular zoning ordinance has destroyed the value or usefulness of property a trial may be provoked, the courts will quickly become planning bodies. This is evident from appellants' contention that economic or physical factors may contradict the reality of uses allowed by regulation. *See* appellants' brief at 10. The consideration of social, economic and environmental factors relating to the property is precisely the function contemplated by the review process in the City's zoning ordinances. In fact, it is usually the process which is contemplated by the planning review mechanisms of most land use regulations. A determination by the City approving a project could vitiate all of the constitutional issues which appellants now try to raise.[13]

Appellants cite three cases in support of their contention that a trial is required under federal law. Those cases do not support this proposition. In *Cuyahoga River Power Co. v. Akron* (1916) 240 U.S. 462 and *Mosher v. Phoenix* (1932) 287 U.S. 29, this Court held that upon allegations that property had been "taken" federal jurisdiction could be invoked. Nothing in those cases indicated that a trial was required to resolve the issues raised. *Portsmouth Harbor L. & H. Co. v. United States* (1922) 260 U.S. 327 involved the alleged firing of military guns over private lands. Quite obviously the physical effect of such activities,

[13]In fact, one of appellants' supporting amici recognizes the function of an administrative remedy in avoiding unnecessary constitutional questions and goes so far as to suggest that administrative remedies should be supplied and be exhausted as a prerequisite to suits in inverse condemnation for compensation. *See* brief of amicus curiae Half Moon Bay Properties, Inc. at 23-25.

possibly in the nature of a physical invasion, raises fact questions. There is simply no similarily between *Portsmouth* and the present circumstance which presents legal issues regarding the scope of constitutional inquiry a property owner may invoke upon the enactment of a zoning ordinance, the application of which has not been decided.[14]

II

THE CITY'S ZONING ORDINANCES ARE VALID UNDER CONSTITUTIONAL STANDARDS OF SUBSTANTIVE DUE PROCESS. FURTHERMORE, THEY SATISFY THE SEVERAL TESTS WHICH HAVE BEEN FORMULATED FOR DETERMINING THAT A REGULATION IS NOT A "TAKING".

A. The Constitutional Standard for Determining the Validity of a Legislative Act (Which Does Not Infringe on any Fundamental Right) Is Whether There Is a Reasonable Basis for the Act and It Has a Substantial Relationship to the Protection of the Public Health, Safety or Welfare. The Zoning Ordinances in Issue Plainly Satisfy that Test.

The substantive due process standard for determining the validity of a legislative act has long been established. *See, e.g., Mugler v. Kansas, supra,* at 661. The test which has been formulated has been stated several ways but the essence of the standard is that legislative enactments will be upheld unless they are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety or general welfare. *See, e.g., Euclid v. Ambler Realty Co., supra,* at 395; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 8. Such exercises of the police power are normally presumed to be constitutionally valid (*see, e.g., Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520,

[14]The general inapplicability of so-called "physical invasion" cases to issues involving conflicts between the exercise of the police power and the Takings Clause is discussed *infra.*

529) and are accompanied by a presumption of reasonableness. *Salzburg v. Maryland* (1954) 346 U.S. 545, 553. Finally, an exercise of the police power will be upheld if any state of facts, either known or which could reasonably be assumed, would support the exercise. *See generally, Goldblatt v. Hempstead* (1962) 369 U.S. 590, 596. Another important factor which has contributed to conclusions by this Court upholding exercises of the police power is where a state tribunal has reasonably concluded that the "health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transp. Co. v. New York City, supra,* at 125.

The ordinances in issue, sustained by the state court, recite the significance of regulating the use of land in order to protect open space.[15] The City's ordinances, standing alone, find support in a set of facts which the enacting Council could believe were sufficient to justify the ordinances. For example, the societal price of unplanned development in environmental degradation and cost of providing public services is well known. Moreover, it is apparent that the City's open space planning program and zoning ordinances are contemplated and mandated by the requirements of California state law. *See generally* Cal. Gov't Code §§ 65302(e), 65560 through 65568, and 65910 through 65912. Specifically, in regard to the finding of the City zoning ordinance just quoted, the California Legislature has found that:

> Discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public

[15]For example, Ordinance No. 123 N.S. finds:

> It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences [of] urban sprawl. (JSA, p. 29).

> interest and will be of benefit to urban dwellers because it will discourage non-contiguous development patterns which unnecessarily increase the cost of community services to community residents.

Cal. Gov't Code § 65561(b).

That the Legislature contemplated that much of the open space planning and regulatory program would be carried out by land use regulations is evident from the requirements of Cal. Gov't Code § 65910 requiring an open space zoning ordinance and the provisions of Cal. Gov't Code § 65567 (requiring that building permits, subdivision maps and open space zoning ordinances be consistent with the local open space plan).

It is abundantly clear that the zoning ordinances satisfy traditional substantive due process tests.

B. Recent Decisions of this Court Have Set Forth the Tests Which Delineate Between Exercises of Governmental Regulatory Authority Which Are Not "Takings" and Those Which Would be "Takings" Unless Invalidated.

The much used term "police power" is "but another name for the power of government." 1 *Nichols on Eminent Domain*, § 1.42[7] at 1-153 (3d rev. ed. 1979). It is one of the most essential and least limitable powers of government. *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 410. In *Andrus v. Allard, supra,* the relationship between the power to regulate and protections accorded to private property was capsulized as follows: "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'." *Id.* at 327.[16] The same

[16]In setting the conceptual framework for establishing that the City's actions do not constitute "takings", appellee will distinguish between the substantive "taking" question (which is argued here) and the appropriate judicial response to an action which, if enforced, could work a "taking" (argued *infra* at IV).

concept was expressed in *Penn Central Transp. Co. v. New York City, supra,* where it was stated that the rights accorded to private property are protected by basic notions of "justice and fairness". *Id.* at 124; *see also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1171-72, 1226 (1967). It is within this constitutional context that the courts have devised tests for determining whether particular regulatory measures, enacted under the broad authority of governmental power, clash with rights accorded to private property under the Takings Clause. Appellee will show that under the tests formulated, its actions are plainly within the arena of the police power and not the territory of the Takings Clause.

We start with the "several factors that have particular significance." *Penn Central Transp. Co. v. New York City, supra,* at 124: "the economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . ." *Id.* at 124. This factor has received added gloss from two subsequent opinions of this Court. In *Kaiser Aetna v. United States, supra,* the United States Army Corps of Engineers raised no objection to the construction of a marina and related facilities in a pond which in its natural state was not a part of the navigable waters of the United States. In an opinion which placed major emphasis on the legitimate investment-backed expectations of Kaiser Aetna, the Court found that the government's assertion of a public right of navigability in the area, after the project had been built and was operating, would be a "taking". *Id.* at 392-93. In *Andrus v. Allard, supra,* the contention that a prohibition on commercial transactions in pre-existing avian artifacts under certain statutes violated fifth amendment property rights was rejected. Specifically, the Court did

not recognize any distinct investment-backed expectations such as to render the statutes a "taking":

> Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Id.* at 327.

In the instant case the City's zoning ordinances apply to prospective development of the property. It is alleged that the property was purchased for residential use and the ordinances, as interpreted by the California Supreme Court, allow residential use.[17] Thus, the land use regulations applicable to appellants' property do not interfere with what is apparently their primary expectation, namely residential use. *See Penn Central Transp. Co. v. New York City, supra,* at 136; Michelman, *supra,* 80 Harv. L. Rev. 1165, 1233-34. In fact, appellants reasonable expectations are not much affected by the zoning ordinances since under the previous zoning five units were the most possible. *See* amici curiae brief of Conservation Foundation, etc. Moreover, the law recognizes that property owners have no vested right because of conditions once obtaining. *Hadacheck v. Sebastian, supra,* at 410. In contemporary circumstances this has been interpreted to mean that the property owner has no vested right until approvals have been received under applicable regulations and relied upon. *South Park Square Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, 344; *Avco Community Developers, Inc. v. South Coastal Regional Commission* (1976) 17 Cal. 3d 785, *cert. den.* 429 U.S. 1083. A rule recognizing an investment-backed expectation based on the regulations in force when property is purchased

[17]*Penn Central* also teaches that "taking" issues are resolved by focusing on the uses allowed by the applicable regulation. *Id.* at 131. *See Sibson v. State* (N.H. 1975) 336 A.2d 239; *Just v. Marinette County* (Wisc. 1972) 201 N.W.2d 761.

would completely frustrate public bodies in applying current public policy at any point in time.

The leeway given to regulatory acts is illustrated in *Penn Central Transp. Co. v. New York City, supra,* where it was pointed out that taking challenges have also been rejected even where the challenged action prohibited a beneficial use to which individual parcels had previously been devoted. *Id.* at 125-27.

Applying these concepts, appellants have no distinct investment-backed expectations such as to cause the City's zoning ordinances to be a "taking". It is noteworthy that appellants make no effort to establish such investment-backed expectations. *See* particularly, appellants' brief at 23-25.[18]

Thus, appellants may use their property for residential development as is their wish. They have made no substantial investment based on governmental approvals or representations. In short, they are no different than any owners of undeveloped land subject to regulatory requirements.

[18]Appellants suggest that their proposed residential construction would not involve any anti-social activity and therefore such cases as *Mugler v. Kansas, supra*; *Hadacheck v. Sebastian, supra*; and *Reinman v. Little Rock* (1915) 237 U.S. 171, are not relevant since in each of those cases a "noxious use" was present. First of all, inappropriate development of the appellants' parcel could certainly have external effects on adjoining property and the City (such as erosion or drainage problems, for example). Secondly, this Court has expressly rejected the "noxious use" characterizations of such cases as *Hadacheck v. Sebastian, supra, Miller v. Schoene* (1928) 276 U.S. 272, and *Goldblatt v. Hempstead, supra.* Thus in *Penn Central Transp. Co. v. New York City, supra,* it was stated:

> These cases are better understood as resting not on any supposed "noxious" quality of the prohibited use but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Id. at 133-34. This statement is equally applicable to the instant case.

A second significant factor, from *Penn Central Transp. Co. v. New York City, supra,* at 124, is action by government which amounts to a physical invasion of property. In applying the concept of fairness the courts have almost universally found such physical invasions to be takings. Michelman, *supra,* 80 Harv. L. Rev. 1165, 1184. The obvious and largely irreversible effect of such physical invasions is to single out affected owners to suffer a cost which in fairness should be spread across all of society (an undue burden). *See, e.g., Armstrong v. United States* (1960) 364 U.S. 40 (government's complete destruction of a materialman's lien in Navy boats held a compensable taking; note, compensation was the only possible remedy since the taking was complete, irreversible and otherwise the owner would suffer exclusively for the public benefit).

The treatment of physical invasion cases accords completely with the historic purpose and utilization of the Takings Clause. Thus, the source of the Takings Clause in English law derived from the fear of English nobles that the King would seize land for his own use. Protection from this fear was included in the Magna Carta. In colonial America compensation was generally provided for physical takings and not discussed with regard to the effect of regulations. It appears that the drafters of the Constitution and the Bill of Rights did no more than carry over the historic British concern regarding arbitrary seizure of land. *See generally,* Bossleman, Callies and Banta, *The Taking Issue* (Council on Environmental Quality, 1973) at 318-20. Regarding physical invasions as takings is proper and fair since government is usually acting for its own benefit in these circumstances to the owner's complete detriment. *See, e.g., Eyherabide v. United States* (Ct. Cl. 1965) 345 F.2d 565 (property surrounded on three sides by Navy gunnery range with many military projectiles landing on the property).

Situations involving governmental regulation are entirely different. In these circumstances government is acting to promote the general welfare through regulation by adjusting the various interests of society through the political process. *Penn Central Transp. Co. v. New York City, supra,* at 124. Usually, as in the present case, such regulations do not single out particular owners but rather affect all similarly situated people in the same manner. Further, such regulations usually provide reciprocal benefits. *See generally HFH, Ltd. v. Superior Court, supra,* at 520-21. To equate the City's ordinances with a "taking" for public use, as appellants would do, reflects a failure to realize that most all governmental regulations in some respect limit the free use of private property. If such can be characterized as a public use, by analogy to a physical invasion, the inherent power of government to regulate would be severely crippled.

But, appellants do equate the City's ordinances with a public use.[19] In so doing appellants rely greatly on provisions of the California Government Code allowing acquisition of interests in property for open space purposes. *See generally* Cal. Gov't Code §§ 6950 through 6954.

Their argument is fallacious. Initially, as previously discussed, Cal. Gov't Code §§ 65560 et seq., in combination with Cal. Gov't Code § 65302(e), mandates each and every city and county within the state to adopt an open space plan. Even a cursory review of those sections reveals that the Legislature intended much of this program to be accomplished by regulation of private use. *See, e.g.,* Cal. Gov't Code §§ 65567 and 65910. Authorizing local agencies to acquire interests in open space merely contemplates that public ownership of interests in some open space lands

[19]*See* appellants' brief, for example, at 11, 26-27; brief of amicus curiae San Diego Gas & Electric at 21; amicus curiae brief of Pacific Legal Foundation at 14.

can be part of an overall open space program. For example, public ownership of an open space parcel could well be more permanent than regulatory efforts such as the City's ordinances. Thus, acceptance of appellants' argument would mean that most open space plans and implementing zoning ordinances in the State of California would constitute "takings" because of the existence of Cal. Gov't Code §§ 6950 et seq. Even to state this proposition is to reveal its erroneous and radical nature. It would no doubt come as a complete surprise to the California Legislature to discover that its state mandated program for protecting open space via a combination of planning through regulation and acquisition, where appropriate, resulted in a "taking" of all open space lands in California! For example, agricultural lands, of which there are vast amounts in California, are generally considered a form of open space. *See* Cal. Gov't Code § 66650(b)(2). Yet, they yield economic return to their owners, are not open to the public and in many instances are included in local open space plans. To consider that they have been "taken" by the enactment of statutes authorizing acquisition is simply erroneous.

Equally unavailing is the effort to characterize the zoning ordinances as having created a servitude in the property. This Court observed in *Penn Central Transp. Co. v. New York City, supra,* that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130-31. The *Penn Central* Court also rejected the characterization of a land use restriction as imposing a servitude. *Id.* at 130 n.27. There is no conceptual distinction between a zoning ordinance which regulates minimum and maximum densities, thereby making it likely that not every square inch of the land can be developed, and setback requirements. *See Gorieb v. Fox* (1926) 274 U.S. 603 (upholding building set-

back requirements without any provision for compensation).

Appellants' position, quite simply, is that the limitations enacted through the City's zoning ordinances operate to single them out to endure a financial hardship. Yet, numerous other properties are subject to the same regulations. Agreement with appellants' argument would not only invalidate the ordinances as to all the properties within the City, but would invalidate all similar open space plans and implementing zoning ordinances in California. This contention was rejected in *Penn Central Transp. Co. v. New York City, supra,* at 131.[20]

The dissent in *Penn Central* was of the view that the landmark restrictions there involved lacked the usual reciprocity which gives support to regulatory schemes. Such reciprocity is present in the instant case as significant amounts of land in the City are subject to the same zoning. Each of the affected owners benefits from the planning control which would be exercised by the City to ensure that development has minimum external effects on their property. Even appellants benefit from these provisions as they would apply to neighboring properties.[21]

In summary, the City's actions do not constitute takings when evaluated against the rules of constitutional law that have evolved to define "justice and fairness" as limitations on the power to regulate.

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[20]It should also be noted that the right to exclude others, observed to be an important property right in *Kaiser Aetna v. United States, supra,* is not in the least abridged by the City's zoning ordinances. There is no right granted to the public to cross over or use appellants' property.

[21]Finally, before a taking can be established, the public use must be permanent. *Wilfong v. United States* (Ct. Cl. 1973) 480 F.2d 1326. Zoning, by its nature, is not permanent and will change over time to meet current needs. *See Euclid v. Ambler Realty Co., supra,* at 387. The City's zoning ordinances, being an expression of current legislative will, are of course subject to change.

C. Appellants' Attack on California Case Law Is Unwarranted.

In a rather strong attack, appellants challenge the California case law dealing with land use issues. A thorough review of the cases discussed reveals that appellants' characterizations are quite inaccurate. For example, appellants insist that the last California case invalidating a land use regulation was some years ago. Apparently, they overlook a decision of the California Supreme Court which was handed down subsequent to the instant case. In *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, *app. dism'd* ..... U.S. ....., 62 L.Ed.2d 403, the landowners alleged that they were precluded from making use of certain sewage facilities which the landowners had been taxed to support through assessments. The case arose on demurrer and the court held, *inter alia,* that if the allegations were proven the landowners would be entitled to declaratory relief or mandate precluding application of certain disputed land use regulations to their property. *Id.* at 877-78. The court thus has made it clear that where application of regulations would constitute a "taking," invalidation is a live remedy in California.[22]

An objective reading of the cases discussed by appellants reveals a sound line of authority. *Avco Community Developers, Inc. v. South Coastal Regional Commission, supra* (vested rights rejected vis-a-vis new regulation where developer lacked all necessary governmental approv-

[22]Appellants also consider *William C. Haas & Co. v. City and Co. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, to have been incorrectly decided. In fact, however, the property owner there contended that the rezoning had such a deep effect on his property, as compared to the benefit to the general welfare, that a "taking" had occurred. The court held, following *Penn Central,* that diminution in property value alone is not a "taking" and that the issue is resolved properly by focusing on the uses which the regulations allow. Specifically, the court found no investment-backed expectations but rather "disappointed expectations". *Id.* at 1121.

als, including building permits); *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125 ("It is the prevailing rule that a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied."); *Toso v. City of Santa Barbara* (1980) 101 Cal. App. 3d 934 (inverse condemnation denied where city refused to up-zone property and abandoned all efforts at acquisition); *Helix Land Co. v. City of San Diego* (1978) 82 Cal. App. 3d 932, 945 ("Helix attempts to recoup profits they might have made on anticipated up-zoning and benefit to their properties deriving from the original—but now abandoned . . . flood channel."); *Friedman v. City of Fairfax* (1978) 81 Cal. App. 3d 667 (property had long been used for recreational purposes and had a remaining value, under the applicable regulations, of $250,000.00 versus a non-regulation value of $1,250,000.00); *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal. App. 3d 736 (a mixed vested rights permit matter before the California Coastal Commission where the owner withdrew a pending application which would have facilitated the project; the court ruled, under established principles, that the owner had thereby failed to exhaust available administrative remedies).[23]

Appellants suggest that the California courts are not following federal law with a resultant shift of actions by landowners to federal courts. The California Supreme Court, in the instant case, recognized that whether a regulation is excessive turns "on the individual facts of each

[23]Appellee will leave to amicus State of California a rebuttal of *Briggs v. State of California* (1979) 98 Cal. App. 3d 190. Further, appellee will not attempt to argue *San Diego G. & E. Co. v. City of San Diego,* U.S. Supreme Court No. 79-678 (as do appellant and amicus San Diego Gas & Electric Company) except to note that even the initial opinion of the Court of Appeal recited that the property owner never sought permission from the City. *See San Diego G. & E. Co., supra,* (1978) 146 Cal. Rptr. 103, 113.

case." (JSA, p. 13). This is the same approach followed by this Court in *Penn Central Transp. Co. v. New York City, supra.* Further, the substantive ruling of the California Supreme Court, drawing on the fact that uses are available for the subject property, is totally consistent with this Court's rulings, particularly in *Penn Central, supra.* The tests applied by the California courts to determine whether a "taking" has occured and, if so, what remedy should be granted do not vary from federal law. Thus, the statement that there will be a shift of these cases to federal courts is purely speculative.[24]

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[24]Contrary to appellants' suggestion, the California courts have acted to protect property owners and developers from overreaching by public agencies. For example, in recent years the California courts have struck down overly restrictive zoning ordinances (*Hoshour v. County of Contra Costa* (1962) 203 Cal. App. 2d 602); struck down onerous conditions placed upon permits issued by public agencies (*Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal. App. 3d 198); upheld the granting of conditional use permits and other land use permits (*Jacobson v. County of Los Angeles* (1977) 69 Cal. App. 3d 374; *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal. App. 3d 76); upheld the granting of variances (*Zakessian v. City of Sausalito* (1972) 28 Cal. App. 3d 794; *Allen v. Humboldt County Bd. of Supervisors* (1966) 241 Cal. App. 2d 158); upheld the approval of local governments of subdivision maps (*Youngblood v. Board of Supervisors* (1978) 22 Cal. 3d 644; *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal. App. 3d 175); and upheld landowner claims of exemption from the permit controls of the California Coastal Commission (*Pardee Construction Co. v. California Coastal Com.* (1979) 95 Cal. App. 3d 471; *Sierra Club v. California Coastal Zone Conservation Com.* (1976) 58 Cal. App. 3d 149; *San Diego Regional Commission v. See the Sea, Limited* (1973) 9 Cal. 3d 888). This list is not exhaustive.

III

THERE HAS BEEN NO ABUSE OF THE EMINENT DOMAIN POWER BY THE CITY AND THERE IS NO CONTINUING INTENT TO ACQUIRE APPELLANTS' PROPERTY. THEREFORE, A "TAKING" CAN NOT BE FOUND BASED ON AN IMPROPER COURSE OF CONDUCT.

Appellants argue that the City had an acquisitory intent such that the Court should ignore the City's zoning ordinances as being merely a part of an acquisition scheme. This argument is utterly meritless.

Under the facts as alleged in the complaint the City sought and received plans from consulting firms for development of an open space program. The two plans were received in July and October of 1972. The zoning ordinances in issue were enacted in June of 1973 as part of the open space program. The City's effort to acquire the subject property by eminent domain was announced by the City through the adoption of a resolution in October of 1973. There is no indication in the complaint that the planning process was less than aboveboard and open. Yet, in approximately one year's time from having received the plans, and within less than six months' time of adopting the zoning ordinances, the City took action to acquire the property. There is certainly no undue delay or abusive conduct suggested by these facts.

Furthermore, the eminent domain action was subsequently abondoned according to the procedures prescribed by California law. Thereafter, there is no indication that the City intended to acquire the property by purchase. Appellants recognize as much. In their statement of the case, it is stated that the City had not altered its objective, but its method for keeping the property in open space and that since the abandonment of the eminent domain

proceeding, the City has relied upon its zoning ordinances. (appellants' brief, at 6). Thus, the acquisition effort by the City was concluded and over. The zoning ordinances could not operate as an oppressive device because no further efforts at acquisition are suggested. Moreover, the zoning ordinances, having widespread application in the City, merely subjected the subject property to the same regulation as is imposed on numerous other properties.

Appellants' real quarrel is the same one as appellees have previously addressed, namely their supposition that the zoning ordinances destroyed the value of the property.

Thus, *Benenson v. United States* (Ct. Cl. 1977) 548 F.2d 939 and *Drake's Bay Land Co. v. United States* (Ct. Cl. 1970) 424 F.2d 574 are inapplicable since in each of those cases efforts by the landowners to undertake development activity or alterations were frustrated in anticipation of acquisition. In the instant case, appellants have never sought to develop their property. Moreover, the City's planning process was open and public and actions were taken in a timely manner. As acknowledged by the California Supreme Court, if calling a bond election and urging passage to secure funds for a public purpose constituted a "taking", the public agency involved would be subject to suit whether or not the issue carried. The exercise of democracy cannot be so burdened. (JSA, p. 14). The receipt of reports, public discussion and consideration of possible acquisition, the adoption of zoning ordinances which apply to a significant portion of the City, and the filing and abandonment of acquisition proceedings according to law cannot constitute inverse condemnation.

The federal courts have refused to intervene in local condemnation proceedings "absent strong and convincing evidence that the government has egregiously abused its condemnation powers." *Donohoe Const. Co., Inc. v. Mont-*

gomery Cty. Council, supra. In *Donohoe* the court distinguished cases such as *Benenson, supra,* and *Drake's Bay Land Co., supra,* in that the pattern of governmental abuse present in those cases was absent in *Donohoe.* In this regard, the court stated:

> Certainly at the commencement of this suit just six months after the decision to acquire was made, it cannot be said that the County had been unreasonably dilatory in instituting condemnation proceedings. To conclude otherwise would, in our opinion, unreasonably burden the legitimate planning efforts of state and local governments.

Id. at 609. There was no unreasonable delay in the instant case and the reasoning of *Donohoe* applies squarely. Furthermore, in *South Park Square, Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, the court stated:

> We would deny a municipality the breathing space needed for responsible decision-making in the vital realm of urban planning if we held that it could not wait ten months to determine what property is needed for major road construction. A city would be unduly hamstrung if its permit decisions subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions.

Id. at 343. Where federal courts have intervened in instances of agencies abusing condemnation powers the circumstances have been egregious. *See Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency* (9th Cir. 1977) 561 F.2d 1327 (land designated for condemnation in 1966 and agency represented that property would be acquired in 1969; agency flooded property by street improvements, but by 1972 determined not to purchase the property).[25]

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[25]Appellants also argue that California has rejected monetary damages for regulatory "takings" in all instances. This is not the case. *See Peacock v. County of Sacramento* (1969) 271 Cal. App. 2d 845. *Peacock* was recently described and its vitality confirmed

IV

WHERE REGULATORY ACTIONS WOULD CONSTITUTE "TAKINGS" IF ENFORCED, THE COURTS HAVE CONSISTENTLY INVALIDATED THE OFFENDING MEASURES.

As discussed previously in section II, the City's zoning ordinances are a valid exercise of the police power which do not impinge on appellants' property rights. However, this case, as resolved by the California Supreme Court, involved an additional issue, namely, whether the remedy for regulatory actions which do infringe on property rights is invalidation of the offending measure, or, as appellants urge, money damages in inverse condemnation.

A. American Courts Have Utilized the Remedy of Invalidation for Land Use Regulations Which Would Otherwise Be "Takings".

In the "taking" area courts have faced the problem of the potential conflict between the inherent power of government to regulate (as expressed in the phrase "police power") and the constitutional guarantees accorded to private property through the Fifth and Fourteenth Amendments.[26] Neither power to regulate nor the protection accorded to property is absolute, especially where they come into conflict. In these circumstances the courts have determined that the appropriate balance between the two is generally to invalidate regulations which would otherwise be

by the California Supreme Court. *See HFH, Ltd. v. Superior Court, supra,* at 517 n. 14. Any suggestion that this rule of law was *sub silencio* over-ruled in the opinion of the California Supreme Court in the instant case is misplaced. The continued life of the rule was expressly recognized in *Toso v. City of Santa Barbara, supra,* at 951-53. *See also Klopping v. City of Whittier* (1972) 8 Cal. 3d 39.

[26]In instances involving the federal government, the conflict may arise as between separate provisions of the United States Constitution. *See Kaiser Aetna v. United States, supra* (clash between the Commerce Clause and the Fifth Amendment).

"takings". This approach strikes the proper balance between the needs of the public, as reflected in actions taken by its duly elected representatives, and the rights of private property owners. The remedy of forced purchase through inverse condemnation (or government by purchase—*see Andrus v. Allard, supra* at 326) does not. The legal theory supporting this conceptual framework is sound. A governmental act which would violate property rights is a legal nullity precisely because it is unaccompanied by an offer of just compensation that would be required to sustain it. *See, e.g., Penn Central Transp. Co. v. New York City, supra,* at 136.[27]

American courts have followed this approach. In *Fred F. French Investing Co., Inc. v. City of New York* (1976) 385 N.Y.S.2d 5, a property owner sought a declaration of unconstitutionality and damages in inverse condemnation allegedly arising from the rezoning of two private parks. Under the rezoning, the parks were to be made available to the public and the air space above (development rights) was to be usable elsewhere in the Manhattan area subject to approval by regulatory authorities and acceptance of the development rights by a qualified owner. The court held the zoning ordinances to be invalid but also held that

[27]This approach is borne out in the instant case. The California Legislature stated, in connection with the required open space zoning ordinance which the City adopted:

> The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor.

Cal. Gov't Code § 65912. Contrary to appellants' assertions, the logical and common understanding of these words is that the Legislature simply did not authorize cities, including appellee, to adopt open space regulatory measures which would be "takings". Rather, if they have that effect, they would be ultra vires under state law and invalid under guarantees of the state and federal constitutions.

there had been no inverse condemnation and consequently no requirement that the City pay just compensation. In developing this conclusion the court stated:

> As noted above, when the State "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

Id. at 8. In elaborating upon the point, the *French* court quoted from Professor Costonis:

> "[T]he goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible."

Id. at 9. *See also Jensen v. City of New York* (1977) 42 N.Y.2d 1079. Courts of other states have followed the same approach. *DeMello v. Town of Plainville* (Conn. 1976) 368 A.2d 71; *Gold Run, Ltd. v. Board of County Planning Com'rs* (Colo. 1976) 554 P.2d 317; *Davis v. Pima County*

(Ariz. 1978) 590 P.2d 459, *cert. den.* (1979) 39 CCH 3178; *Eck v. City of Bismark* (N.D. 1979) 283 N.W.2d 193.[28]

This Court has never directly addressed the remedy question in the context of a land use regulation. As appellants now concede, *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 does not stand for the proposition that just compensation is required when a regulatory act infringes on property rights.[29] However, to the extent that this Court considered this issue in *Penn Central Transp. Co. v. New York City, supra,* it is evident that the Court assumed that an improper exercise of the police power would be invalid precisely because of its failure to provide just compensation:

> Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we have thus far established is that the New York City law is not rendered invalid by its failure to provide "just compensation"....

Id. at 135-36. The opinion went on to note: "We now must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413." *Id.* at 136. *See also Kaiser Aetna v. United States, supra,* (governmental assertion of right to public navigability

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[28]Innumerable cases follow this concept. Other examples include *Cardon Oil Co. v. Phoenix* (Ariz. 1979) 593 P.2d 656; *Trustees Under Wills, etc. v. Town of Westlake* (La. 1978) 357 So. 2d 1299; *Mailman Development Corp. v. City of Hollywood* (Fla. 1974) 286 So. 2d 614; *Gaebel v. Thornbury Township, Delaware County* (Pa. 1973) 303 A.2d 7; *State v. Johnson* (Me. 1970) 265 A.2d 711; *Scrutton v. County of Sacramento* (1969) 275 Cal. App. 2d 412.

[29]At pp. 32-33 of appellants' brief appellants accuse the California Supreme Court of misapplying *Pennsylvania Coal.* This is surely a curious statement since the California Supreme Court expressly recognized that *Pennsylvania Coal* did not "transmute the illegal governmental infringement into an exercise of eminent

enjoined since if allowed it would constitute a "taking"; however, remedy issue not directly addressed).[30]

Appellants argue that the power to invalidate is a measure of last resort. (Appellants' brief at 38). In reality, however, the cases cited by appellants reflect the traditional policy of this Court not to reach constitutional issues or to strike legislative enactments unless the issues are squarely presented. Thus in *Alma Motor Co. v. Timken-Detroit Axle Co.* (1946) 329 U.S. 129, the Court followed the usual rule that if two issues are raised, one of a non-constitutional nature and the other of a constitutional nature, and the decision can be made on non-constitutional grounds, then the Court will make that choice. *Id.* at 136. Likewise, in *Specter Motor Co. v. McLaughlin* (1944) 323 U.S. 101, this Court refused to reach constitutional issues arising under state law where the state law had not been definitively construed by state courts. Finally, in *Rescue Army v. Municipal Court, supra,* as previously noted, there is an extensive discussion regarding the policy of resolving constitutional issues only by strict necessity. *Id.* at 568-75. In none of these cases is an issue regarding choice of remedies presented. Appellants' point is not well taken.

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domain and the possibility of compensation was not even considered." (JSA, p. 9). Appellants read *Pennsylvania Coal* the same way.

[30]Appellants cite *Penn Central* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) 99 S. Ct. 1171 for the proposition that "the just compensation remedy was not even questioned." (appellants' brief at 34). Appellants make no attempt whatsoever to justify this statement as regards the *Penn Central* opinion and, as pointed out above, the contrary proposition seems more appropriate. In *Lake Country Estates,* because of the posture of the case, the Court dealt with immunities available to the Tahoe Regional Planning Agency and its governing body members pursuant to the Civil Rights Act (42 U.S.C. § 1983). There is no discussion in the opinion regarding the appropriate remedy. In fact, on remand in one of the cases consolidated in *Lake Country Estates* the district court held that declaratory relief is the proper remedy. *Jacobson v. Tahoe Regional Planning Agency* (1979) 474 F. Supp. 901.

B. The Courts Have Ordered Damages Where Such Damages Have Been Contemplated or Intended by the Legislature. Otherwise the Courts Have Invalidated Confiscatory Regulations.

Appellants' money damages remedy would, if accepted, transfer a significant portion of the power of the purse from local and state legislatures to the judiciary, with concomitant damage to legislative independence and the budgetary process. It is certain that the judiciary must make the often difficult determination of whether a particular regulatory action is sufficiently oppressive that it violates a landowner's constitutional rights. That decision can involve close questions and subtle distinctions. As long as invalidation is the remedy, these difficulties are simply the acceptable price always associated with judicial line-drawing in a complex policy area. However, under appellants' theory of remedy, the price of stepping over the line, however slightly and however innocently, would be a forced purchase, unbudgeted and unplanned, and in the case of innovative regulation, impossible to anticipate. The courts have been sensitive to this concern and have awarded damages where they have been legislatively authorized.[31]

Thus, in *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102, the question was whether certain mandatory provisions of the acts there involved were "takings". It was stated: "There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." *Id.*

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[31]Appellants acknowledge that control over funding is a political question for legislative action. (appellants' brief at 16-17, 40-41). Appellants would, however, reverse the normal rules by having the courts make determinations of fiscal policy rather than legislative bodies.

at 134. The entire premise of the opinion was that if the Tucker Act would be available to provide a monetary remedy for any deficiency in payment to the railroads, then the availability of that Act would remedy any constitutional infirmity which might otherwise exist because of no provision for compensation. The Court concluded that Congress had not intended to withdraw the Tucker Act grant of jurisdiction to the Court of Claims in suits arising under the Rail Act. It seems apparent that had the Court concluded that damages were not available, via Congressional consent, the offending provisions of the Rail Act would have been stricken.

Another example of this approach is in *U.S. Trust v. New Jersey* (1977) 431 U.S. 1. While the issues involved impairment of contract, it is significant that the repeal by New Jersey of a provision which the Court held impaired the rights of certain bondholders was declared unconstitutional and void. *Id.* at 32. The opinion noted that: "The State remains free to exercise their powers of eminent domain to abrogate such contractual rights, upon payment of just compensation." *Id.* at 29 n.27. Thus, the Court invalidated the offending measure and left to the legislative body the choice of whether to extinguish those rights by payment of compensation. Appellants' implication that *U.S. Trust* required the payment of compensation is erroneous (appellants' brief at 39-40). See also *United States v. Clarke* (March 18, 1980) .... U.S. .... (whether an action in inverse condemnation is the proper remedy for a "taking" of Indian land is a question of Congressional intent).

The lower federal courts have recognized that compensation may be appropriate where Congress intended that the government acquire an interest in property. For example, in *Drake's Bay Land Co. v. United States, supra,* the Court held that Congress intended for the United States to acquire

an inchoate interest in the property at the time legislation was enacted authorizing the Point Reyes National Seashore. P.L. 87-657. The failure of government officials to expeditiously acquire the property coupled with their acts blocking development were held to justify an award of compensation. *See also Benenson v. United States, supra.*

The zoning ordinances in issue are immunized from liability under California law. *See generally* Cal. Gov't Code §§ 818.2, 818.4 and 821.2. The California Supreme Court has consistently interpreted these provisions to indicate legislative intent to confer immunity from damages for the enactment of zoning and planning measures. *Selby Realty Co. v. City of San Buenaventura, supra,* at 127; *State v. Superior Court* (1974) 12 Cal. 3d 237, 245-47; *HFH, Ltd. v. Superior Court, supra,* at 519-20. These same decisions have rejected causes of action seeking just compensation for "takings". It would seem clear that the California decisions have been following legislative direction by rejecting claims for just compensation. That is, since the Legislature has immunized these acts, it clearly can not have intended that compensation be paid.

Recently this Court sustained the validity of analogous immunities enacted under California law, finding that they rationally further a policy that reasonable lawmakers may favor. *Martinez v. California* (1980) ..... U.S. ....., 40 CCH S. Ct. Bull. B427. The Court recognized that the stated purpose of the section at issue was to allow correctional personnel to make determinations of parole unfettered by fear of tort liability. *Id.* at B432 n.6. The same policy considerations apply to land use regulation.[32]

Thus, the courts have recognized that inhibiting essential governmental actions taken to promote the public welfare

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[32]The Florida Legislature has determined that property owners can be compensated under certain specified circumstances. See Laws of Florida, ch. 78-85.

by the risk of damages is generally unacceptable. If governmental entities exercise their police powers in a Russian roulette-like manner, such that where they have guessed wrong they would have inadvertently purchased interests in regulated parcels, meaningful and necessary regulation of land use would be substantially impaired with a predictable adverse effect on the general welfare. In *Sala v. County of Suffolk* (2d Cir. 1979) 604 F.2d 207, U.S. app. pndg., the court, citing and paraphrasing this Court's decision in *Scheuer v. Rhodes* (1974) 416 U.S. 232, stated:

> Although the detrimental effect that unforeseeable municipal liability may have on forceful decision making may be less direct than in the case of personal liability, it is clear that the threat of such liability may inhibit public officials from "mak[ing] decisions when they are needed or . . . act[ing] to implement decisions when they are made."

Id. at 211. Similarly, in *Charles v. Diamond* (1977) 392 N.Y.S.2d 594, the court observed that extending liability where there had been no de facto appropriation of private property would lead to limitless municipal liability. Specifically, the court stated:

> More important, the prospect of tort liability might impede equally desirable governmental regulation and legislation since municipal officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation.

Id. at 604-05. The North Dakota court has expressed similar fears. In *Eck v. City of Bismark, supra,* it was stated:

> We agree that the potential consequences of an action for inverse condemnation militate against its availability to challenge the constitutionality of governmental regulation. If actions for inverse condemnation loom in the future, land-use planning might be stymied, the fiscal-budgetary process chaotic, and the financial burdens on the community staggering. Most important, authorization of such an action would enable North Dakota courts to sit as legislative bodies doling out the State and local fisc.

Id. at 200-01.[33] This Court has recognized in other contexts the effect that significant financial costs imposed by higher authority can have on normal governmental programs and legislative choices. *See National League of Cities v. Usery* (1975) 426 U.S. 833, 846-47.

Likewise, commentators have recognized the inhibiting effect that a compensation remedy would have:

> Clearly the threat to the governmental pocketbook will intimidate legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest. Yet the threat of contingent and unplanned-for liability, through inverse condemnation, would especially in these places, deter legislators from enacting the kind of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge.

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[33]The recognition of the proper roles of the courts and legislative bodies in determining the appropriate social allocation of limited financial resources was acknowledged in *Kasser v. Dade County* (Fla. 1977) 344 So. 2d 928. There the property owner sought rezoning of his property for a higher use. That request was denied. The court rejected the owner's action claiming that the county had effectively taken the property without compensation and held that the owner had a sufficient remedy under local procedures to challenge the validity of the underlying zoning ordinance:

> Had review been sought in the stipulated fashion and the action by the Board found to be unreasonable and confiscatory, the County would then have had the option of rezoning the property or condemning it via its eminent domain authority.

Id. at 929.

Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation,* Urb. L. Ann. 1-2 (1968). *See also* Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L. J. 1569, 1597 (1977)[34]

Appellants reply that invalidation is an insignificant remedy.[35] This is not so. Appellants recognize as much

[34]The issue of so-called "interim damages" was not dealt with by the court below, is not raised as an issue in the jurisdictional statement or appellants' brief. The issue was squarely presented and resolved in *HFH, Ltd. v. Superior Court, supra,* in which the California Supreme Court rejected interim damages under a theory of inverse condemnation and this Court declined review. In any event, appellee believes, as concluded by the California Supreme Court, that such damages would lie only if authorized by legislation.

[35]Amici supporting appellants have cited a number of writers as supporting the remedy of just compensation in regard to regulation (*see, e.g.,* brief of amicus curiae in support of appellants at 53 et seq.). In this regard, however, several writers have questioned the propriety of a monetary remedy (*see, e.g.,* Delafons, *Land Use Control in the United States* (2d ed. 1969) at 110-11; Mandelker, *Inverse Condemnation: The Constitutional Limits* (1966) Wis. L. Rev. 3, 48-49). A number of writers have suggested legislative provision for damages in certain cases of regulation (*see, e.g.,* Carmichael, *Transferable Development Rights as a Basis for Land Use Control,* 2 Fla. St. U. L. Rev. 35 (1974); Rose, *A Proposal for Separation and Marketability of Development Rights as a Technique to Preserve Open Space,* 2 Real Estate L.J. 635 (1974); Costonis, *The Chicago Plan, Incentive Zoning and the Preservation of Urban Landmarks,* 85 Harv. L. Rev. 574 (1972); Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. Pa. L. Rev. 179 (1961); Bossleman, Callies and Banta, *The Taking Issue, supra*). Some commentators have advocated that the damage remedy is excessive (*see, e.g.,* Girard, *Agins: A Step in the Right Direction,* Land Use L. & Zoning Dig. (September 1979); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation,* 24 Buff. L. Rev. 273 (1975); Clark and Kidman, *The Relationship of Just Compensation to the Land Use Regulatory Power,* 2 Pepperdine L. Rev. 79 (1975); Comment, 26 Stan. L. Rev. 1439 (1974); Beuscher, *Land Use Controls: Cases and Materials* (3d ed. 1964) at 538-50; Note, 66 Harv. L. Rev. 1134 (1953)).

when they point to the political and social turmoil that would be raised in passing new legislation to meet judicial rulings. (appellants' brief, at 43 n. 23). Appellants also suggest that the balance sheet of a public agency would be the same after acquisition. Such is not the case, as public agencies would be judicially compelled to acquire, in many instances, negative easements in the nature of restrictions on development and in order to preserve the underlying regulation (e.g., agricultural land), those interests would have little value and could not be sold. Furthermore, placing public agencies into competition with the private sector by having them engage in the land acquisition and sale business on a massive scale would seem to be more appropriately a legislative decision.[36]

C. Physical Invasion Concepts Are Not Applicable.

As this Court observed in *Penn Central Transp. Co. v. New York City, supra,* government actions that have as their effect the acquisition of resources to permit or facilitate uniquely public functions have been recognized as compensable takings. *Id.* at 128. As noted previously, concepts of fairness suggest the propriety of compensation where an owner has lost an interest in property by governmental acquisition for a direct public use. These considerations are not raised in the regulatory context.

Thus, appellants' suggestion that *Hurley v. Kincaid* (1932) 285 U.S. 95 is dispositive is simply erroneous. In that case suit was brought by downstream owners to en-

[36]Several of appellants' amici suggest that agencies will constantly readjust their position following adverse court rulings. This is pure surmise since it is not involved in the facts as alleged in this case. To premise a constitutional doctrine on the supposition that governmental authorities will generally act in bad faith and attempt to circumvent judicial decrees would be inappropriate. Significantly, it is just not likely that the courts will lightly sanction evasions of their orders. Remedies such as retention of jurisdiction or contempt are available.

join a flood control project on the ground that it would flood their property. This Court rejected injunctive relief but did conclude that construction of the project could require compensation for flooding. Not only does *Hurley* obviously fall into the physical invasion category, it is also an example of the Court's recognition of governmental purpose. An injunction could frustrate carrying forth of the public works project while an award of damages under the Tucker Act allowed the project to proceed, as contemplated by Congress, and allowed damages, as contemplated by Congress. This case, as well as the other cases cited for this proposition (*Dugan v. Rank* (1963) 372 U.S. 609; *Fresno v. California* (1963) 372 U.S. 627; *Regional Rail Reorganization Act Cases, supra;* and *United States v. Gerlach Livestock Co.* (1950) 339 U.S. 725) have no application in the present context.

Where land has been physically appropriated by government there is lacking the potential conflict between the governmental power to regulate and the Takings Clause. It is the balancing of interests in the latter circumstance which is involved here. The courts, perhaps as much pragmatically as analytically, have recognized this difference and have not awarded compensation in the regulatory context.

V

SUPPOSED EXCLUSIONARY EFFECTS AND IMPACTS ON THE COST OF HOUSING ARE NOT ISSUES IN THIS CASE.

Appellants and their amici suggest that the City's zoning ordinances have an exclusionary effect and will operate to increase the price of housing. These are not issues which were raised below, either in the pleadings or in the arguments presented.[37]

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[37]In *Warth v. Seldin* (1975) 422 U.S. 490, the Court held that property owners have no standing to assert the rights of third parties who claim to be excluded. *Id.* at 509-10.

The owners sought relief for themselves by way of compensation (or invalidation per their count in declaratory relief). The late assertion of exclusionary effects lacks credibility since there is no rational connection between awarding appellants just compensation, as they seek, and providing relief to third parties who supposedly are excluded. If a local government were intent upon excluding outsiders and if a court were to award just compensation for the taking of a particular parcel of property, the local government, upon acquiring ownership, would not likely make the land available to outsiders.

Moreover, appellants' complaint alleges no facts which could establish that the City is using its plans and zoning ordinances for exclusionary purposes. Instead, appellants wish to argue such exclusionary intent and effect from the fact that their land was not zoned for a higher density. The appellants also ignore the numerous statutory requirements imposed on the City as it determines the mix and density of land uses. For example, California law requires the City to have a housing element in its general plan which makes "adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c).

In the same regard, the concern expressed over housing costs is a classic example of a concern properly directed to a lawmaking body. There are innumerable factors which must be balanced in the adoption of a land use regulatory system. The density of residential use assigned by the City to appellants' land is balanced by other densities in other locations, and it is up to the City, not the appellants or the courts, to make the complex determinations as to which use goes where. So long as the balance struck does not infringe on fundamental rights and is not arbitrary or unreasonable:

> The federal court is not a super zoning board and should not be called on to mark the point at which

legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

Construction Industry Ass'n v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 908.

CONCLUSION

For the foregoing reasons appellee, City of Tiburon, respectfully requests that the judgment of dismissal be affirmed.

Date: March 24, 1980

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